Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term, 1978

No. 27, Original

THE STATE OF OHIO,
Plaintiff,

vs.

THE COMMONWEALTH OF KENTUCKY,
Defendant.

REPORT OF SPECIAL MASTER

ROBERT VAN PELT
Senior U.S. District Judge
Lincoln, Nebraska
Special Master

JOE CHRISTENSEN, INC., 1540 Adams, Lincoln, Nebraska

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This original action instituted in March, 1966, involves the determination of the boundary between the State of Ohio and the Commonwealth of Kentucky insofar as the Ohio River constitutes their common boundary.

Jurisdiction was invoked under Article III, Section 2, Clause 2, of the Constitution of the United States.

The Honorable Phillip Forman was the first Special Master appointed in the case. 385 U.S. 803 (1966). In 1977, Judge Forman, who was then in poor health, submitted his resignation. The writer was appointed to succeed him on July 28, 1978. Judge Forman died August 17, 1978. Mr. Justice Blackmun in 1973 delivered an opinion for the Court, with Mr. Justice Douglas dissenting, which is hereafter discussed at length. *See Ohio v. Kentucky*, 410 U.S. 641.

BACKGROUND HISTORY

It will facilitate the reading of this report to review certain facts.

Mr. Justice Blackmun, in the opinion above cited, stated the history of this case as follows:

> Almost seven years ago, in March 1966, the State of Ohio instituted this original action against the Commonwealth of Kentucky. By its prayer for relief in its proposed bill of complaint, Ohio asked only that the Court declare and establish:
>
> "1. The boundary line between the State of Ohio and the State of Kentucky as being the low water mark on the northerly side of the Ohio River in the year 1792. . . .
>
> "2. The State of Ohio and the State of Kentucky have equal and concurrent jurisdiction over and on all of the Ohio River from the northerly shore to the southerly shore, except jurisdiction incidental to the sovereignty of the soil under the river and structures permanently attached thereto."
>
> In its complaint Ohio alleged:
>
> "4. The State of Ohio was established from the land ceded by legislative act of the Commonwealth of Virginia to the United States on the 1st day of March, 1784, which act is known as the Cession of Virginia.
>
> "5. The State of Kentucky was established by the separation of the District of Kentucky from the jurisdiction of the Commonwealth of Virginia pursuant to that certain act of the Virginia Legislature entitled 'An Act concerning the erection of the district of Kentucky into an independent state,' passed on the 18th day of December, 1789, which act is known as the Virginia-Kentucky Compact.
>
> "6. The northern boundary line of the State of Kentucky was established from the Cession of Virginia and the Virginia-Kentucky Compact as the low water mark on the northerly side of the Ohio River as it existed in the year 1792."[1]

Ohio went on to allege: From 1910 to 1929, the United States erected dams in the Ohio River for navigational pur-

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1. 1792 is the year Kentucky became a State. 1 Stat. 189.

poses. Since 1955, it has been replacing the earlier dams with higher ones. This has caused the waters of the river to rise and permanently inundate various areas of both Ohio and Kentucky. "As a result, the shores or banks of the Ohio River have been moved farther northerly and southerly as the water levels have increased by the damming of the river." The north low water mark of 1792 "has been obscured by the increased elevation of the water levels." Kentucky has claimed that the line between the two States is "along the present northerly shore line of the Ohio River rather than the 1792 northerly low water mark which is located to the south of the present north shore line." Ohio "does now and has always claimed . . . that the boundary between it and Kentucky is the 1792 northerly low water mark."

Leave to file the bill of complaint was granted. 384 U.S. 982 (1966). Kentucky by its answer admitted the allegations of the above-quoted numbered paragraphs of Ohio's complaint. . . .

Five years later, in August 1971, Ohio moved for leave to file an amended complaint. By this amendment Ohio would assert that the boundary between it and Kentucky is the middle of the Ohio River, or, only alternatively, is the 1792 low water mark on the northerly shore. We referred the motion to the Special Master. 404 U.S. 933 (1971). He held a hearing and in due course filed his report. 406 U.S. 915 (1972). The Master recommended that this Court enter its order denying Ohio's petition for leave to amend. His conclusion rested on the ground "that the proposed amendment, in any view of its factual allegations, fails as a matter of law to state a cause of action." Report 16. Upon the filing of Ohio's exceptions and Kentucky's reply, we set the matter for argument. 409 U.S. 974 (1972).

Id. at 642-44.

Exceptions were argued January 10, 1973. The motion for leave to amend was denied in *Ohio v. Kentucky, supra*, and the case was remanded to the Special Master for further proceedings.

In May, 1974, following remand, the parties entered into a stipulation which was approved by Judge Forman on May 31, 1974. The original,[a] which was contained in

a. A copy is reproduced as Appendix #1 to this report.

his file hereafter mentioned, will be filed with the Clerk of this Court.

The parties agreed[b] that the issues submitted to Judge Forman under this stipulation should be resubmitted to me as his successor.

Your Special Master reports that Mr. Angelo W. Locascio, Clerk of the United States District Court for the District of New Jersey, on July 31, 1978, writing on behalf of Judge Forman, furnished him Judge Forman's files, including a rough draft of certain findings which Judge Forman was considering for his report to this Court.

THE SOLE ISSUE

Judge Forman's papers indicate that he had concluded under the stipulation that there was submitted to him this question: Whether the boundary line between Kentucky and Ohio is the low-water mark on the northerly side of the Ohio River as it existed in the year 1792 or the low-water mark on the northerly side of the river as it exists today? I agree with this statement of the issue and will confine this report to that issue only.

FURTHER FACTS AND APPLICABLE LAW

This case arises in part because of the movement of the Ohio River to the north and west since 1792. In addition, large dams have been erected on the river by the United States causing inundation of the 1792 north and south banks of the Ohio. Thus, the north and west shore line has moved or been moved even farther north and west. *See Ohio v. Kentucky, supra* at 643; Kentucky's Ohio River Boundary From The Big Sandy to the Great Miami, Informational Bull. No. 81, Kentucky Legislative Research Comm. (1969); Kentucky's Ohio River Boundary

b. The letters to this effect from the offices of the two Attorneys General will be submitted to the Clerk for filing with this report.

From The Great Miami to the Wabash, Informational Bull. No. 93, Kentucky Legislative Research Comm. (1972), which had been marked No. 2 and 3, respectively, prior to delivery to your Special Master as a part of Judge Forman's file.[c]

This is not the first time the location of state boundaries on the Ohio River has had to be settled by this Court. In *Handly's Lessee v. Anthony*, 18 U.S. (5 Wheat.) 374 (1820), Chief Justice Marshall, in delivering the court's opinion, stated in part:

> The two exceptions present substantially the same questions to the court, and may, therefore, be considered together. They are, whether land is properly denominated an island of the Ohio, unless it be surrounded with the water of the river, when low ? and whether Kentucky was bounded on the west and north-west by the low-water mark of the river, or at its middle state? or, in other words, whether the state of Indiana extends to low-water mark, or stops at the line reached by the river when at its medium height?
>
> In pursuing this inquiry, we must recollect, that it is not the bank of the river, but the river itself, at which the cession of Virginia commences. She conveys to congress all her right to the territory "situate, lying and being to the north-west of the river Ohio." And this territory, according to express stipulation, is to be laid off into independent states. These states, then, are to have the river itself, wherever that may be, for their boundary. This is a natural boundary, and in establishing it, Virginia must have had in view the convenience of the future population of the country.
>
> When a great river is the boundary between two nations or states, if the original property is in neither, and there be no convention respecting it, each holds to the middle of the stream. But when, as in this case, one state is the original proprietor, and grants the territory on one side only, it retains the river within its own domain, and the newly-created state extends to the river only. The river, however, is its boundary.

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c. Informational Bulletins Nos. 81 and 93 will be filed with the Clerk of the Supreme Court with this report.

Id. at 378. The Chief Justice further noted that if the river itself was the boundary, the limits of Indiana would be determined by the rise and fall of the river and the same land would sometimes be in Kentucky and sometimes in Indiana. In determining that the boundary would be the low-water mark, the Court stated:

> The principle, that a country bounded by a river, extends to low-water mark, a principle so natural, and of such obvious convenience as to have been generally adopted, would, we think, apply to that case. We perceive no sufficient reason, why it should not apply to this.

Id. at 383.

Like Indiana, Ohio received its territory from the United States. Therefore, in ruling on the motion of Ohio to amend its complaint to allege that the middle of the river constituted the boundary between the State of Ohio and the Commonwealth of Kentucky, it is not surprising that this Court in its previous opinion in this case discusses *Handly's Lessee*, *supra*. This Court in its prior opinion in this case said:

> In *Handly's Lessee v. Anthony*, 5 Wheat. 374 (1820), this Court stated that the boundary between Indiana and Kentucky was the low water mark on the western or northwestern side of the Ohio River. *Handly* was an action for ejectment brought by a plaintiff claiming under a grant from Kentucky against defendants claiming under a grant "from the United States, as being part of Indiana." *Id.*, at 375. The disputed land was a neck south of a channel, or bayou, that had formed north of the main river. When the river was high, the channel filled and cut off the land to the north. When the river was low, the channel was dry in part and the separation did not exist. The resolution of the case turned on whether the land was in Indiana or in Kentucky. Indiana, like Ohio, received its territory from the United States. The Court in *Handly* observed that the question "depends chiefly on the land law of Viriginia, and on the cession made by that State to the United States," *id.*, at 376, and concluded that the United States acquired title from Virginia when negotiations during the period from 1781-1784 resulted in Virginia's ceding its lands north and west of the Ohio River to the Fed-

eral Government.[2] Kentucky was received as a State of the Union in 1792 out of territory Virginia purported to retain at the time of the 1784 cession. The Court concluded, on the basis of this history, that Kentucky, through Virginia, extended up to the low water mark on the northern, or far, side of the Ohio River. Mr. Chief Justice Marshall enunciated the following, now familiar, principle:

> "When a great river is the boundary between two nations or states, if the original property is in neither, and there be no convention respecting it, each holds to the middle of the stream. But when, as in this case, one State is the original proprietor, and grants the territory on one side only, it retains the river within its own domain, and the newly-created State extends to the river only. The river, however, is its boundary." 5 Wheat., at 379.

The rule of the *Handly* case, as well as its specific application to the Kentucky-Indiana border, has been consistently adhered to in subsequent decisions of this Court. *Indiana v. Kentucky*, 136 U.S. 479 (1890) (despite Indiana's argument, *id.*, at 486-493, that its boundary was the middle of the river); *Henderson Bridge Co. v. Henderson City*, 173 U.S. 592 (1899);[3] *Nicoulin v. O'Brien*, 248 U.S. 113 (1918). It has been

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2. Recommendation of the Continental Congress, September 6, 1780, 10 W. Hening, Laws of Virginia 562 (1822); Resolution of the General Assembly of Virginia, January 2, 1781, conditioned, among other things, upon ratification of the Articles of Confederation and upon like cessions by other States, *id.*, 564, 567; Act of the Continental Congress, September 13, 1783, 25 J. of the Cont. Cong. 1774-1789, p. 559 (1922); Act of Confirmation, October 20, 1783, 11 W. Hening, Laws of Virginia 326 (1823); Act of the Continental Congress, March 1, 1784, 1 Laws of the United States 472 (B. & D. ed. 1815).

The 1781 Virginia resolution recited that the Commonwealth "will yield to the congress of the United States . . . all right, title, and claim that the said commonwealth hath to the lands northwest of the river Ohio." 10 W. Hening, Laws of Virginia 564 (1822). Among the proposed conditions was also a guarantee by the United States to Virginia of "all the remaining territory of Virginia included between the Atlantic Ocean and the south east side of the river Ohio." *Id.*, at 566. This latter condition was not agreed to by the Congress by its Act of 1783. 25 J. of the Cont. Cong. 1774-1789, p. 563 (1922).

The 1783 Act referred to territory "to the north-west of the river Ohio." 11 W. Hening, Laws of Virginia 327. So, too, did the deed of March 1, 1784, from Virginia to the United States accepted by Congress on the same day. 1 Laws of the United States, *supra*, at 474.

3. "Upon this question of boundary nothing can be added to what was said in the cases cited; and it must be assumed as indisputable that the bound-

explicitly recognized by the Supreme Court of Ohio in *Booth v. Shepherd*, 8 Ohio St. 243, 247-248 (1858), where it was stated with far greater precision than the mere assumption the dissent suggests, *post*, at 654-655, that:

> "The construction given to the Virginia deed of cession by the supreme court of the United States, having been thus acquiesced in and acted on by the courts, both of Virginia and Ohio, may be regarded as decisive of the question."

See also *Lessee of McCullock v. Aten*, 2 Ohio 307, 310 (1826); *Lessee of Blanchard v. Porter*, 11 Ohio 138, 142 (1841).[4] See *Commonwealth v. Garner*, 3 Gratt. 655 (Gen. Court of Va. 1846).

Id. at 645-47.

If the foregoing is insufficient to determine the issue of whether the low-water mark of 1792 or of today marks the boundary between the State of Ohio and the Commonwealth of Kentucky, we can turn to *Indiana v. Kentucky*, 136 U.S. 479 (1890) (Original No. 2 in this Court) for further guidance.

Both Kentucky and Indiana claimed possession and jurisdiction over Green River Island, a tract nearly five miles long and half a mile wide lying on the north side of the Ohio River. Kentucky alleged: 1) That when it became a state in 1792, its boundaries extended to the northerly low-water mark of the Ohio River and that in 1792 the river ran north of Green River Island, 2) that it had long undisturbed possession of the island, and 3) there had been recognition of its rights by legislation of Indiana. Indiana rested its claim upon the fact that when it was admitted to the Union in 1816 its southern bound-

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ary of Kentucky extends to low-water mark on the western and northwestern banks of the Ohio River." *Henderson Bridge Co. v. Henderson City*, 173 U.S. 592, 613 (1899).

4. There is a possible intimation to the contrary in the bridge tax case of *Covington & Cincinnati Bridge Co. v. Mayer*, 31 Ohio St. 317, 327, 329 (1877). The case appears, however, to have been resolved on the content of the bridge company's Ohio charter granting permission for the erection of the bridge. See *Sebastian v. Covington & Cincinnati Bridge Co.*, 21 Ohio St. 451 (1871).

ary was designated as the Ohio River. In 1890, when the case was decided in this Court, the Ohio ran south of Green River Island. A map reproduced at 136 U.S. 485 clearly shows the river boundary at the time of an 1806 survey and the low-water mark line on the north-west side of the river in 1888. Indiana alleged the river ran south of Green River Island in 1816.[d] Relying on the principles enunciated in *Handly's Lessee, supra*, the Court stated:

> But the question here is not, as if the point were raised today for the first time, to what State the tract, from its situation, would now be assigned, but whether it was at the time of the cession of the territory to the United States, or more properly when Kentucky became a State, separated from the mainland of Indiana by the waters of the Ohio River. Undoubtedly, in the present condition of the tract, it would be more convenient for the State of Indiana if the main river were held to be the proper boundary between the two States. That, however, is a matter for arrangement and settlement between the States themselves, with the consent of Congress. If when Kentucky became a State on the 1st of June 1792, the waters of the Ohio River ran between that tract, known as Green River Island, and the main body of the State of Indiana, her right to it follows from the fact that her jurisdiction extended at that time to low-water mark on the northwest side of the river. She succeeded to the ancient right and possession of Virginia, and they could not be affected by any subsequent change of the Ohio River, or by the fact that the channel in which that river once ran is now filled up from a variety of causes, natural and artificial, so that parties can pass on dry land from the tract in controversy to the State of Indiana. Its waters might so depart from its ancient channel as to leave on the opposite side of the river entire counties of Kentucky, and the principle upon which her jurisdiction would then be determined is precisely that which must control in this case. *Missouri v. Kentucky*, 11 Wall. 395, 401. Her dominion and jurisdiction continue as they existed at the time she was admitted into the Union, unaffected by the action of the forces of nature upon the course of the river.

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d. The opinion mentions that changes in the river were to be expected because of several vast watersheds which altered the course of the river in the area of Green River Island.

> The question then becomes one of fact, did the waters of the Ohio pass between Green River Island and the mainland of Indiana when Kentucky became a State and her boundaries were established?

Id. at 508-09. The Court then discussed acquiescence and prescription, a subject dealt with later in this report. The Court specifically recognized in its opinion that in 1792 the waters of the Ohio River flowed north of Green River Island, concluding that the northern and western boundary of the State of Kentucky was the northerly low-water mark of the Ohio River as it existed in 1792 and not as it existed at the time of the litigation. The last paragraph of the opinion reads:

> Our conclusion is, that the waters of the Ohio River, when Kentucky became a State, flowed in a channel north of the tract known as Green River Island, and that the jurisdiction of Kentucky at that time extended, and ever since has extended, to what was then low-water mark on the north side of that channel, and the boundary between Kentucky and Indiana must run on that line, as nearly as it can now be ascertained, after the channel has been filled.

Id. at 518-19.

Kentucky seeks to distinguish these cases. It argues that in *Handly's Lessee, supra*, there is language to the effect that Virginia or any state deriving property from her retains the river within its own domain and the river constitutes the boundary. Kentucky argues that Virginia must have intended the boundary to be a natural moving and continuing line and that it follows that Ohio's claim that the boundary became fixed in 1792 is without merit. Kentucky also argues that *Indiana v. Kentucky, supra*, should be read to concern itself only with the ownership of Green River Island and not the determination of the entire boundary between the two states along the Ohio River. However, this completely ignores the premise in *Handly's Lessee*, which provided substantial foundation for the *Indiana* decision, that

> The state of Virginia intended to make the great river Ohio, throughout its extent, the boundary between the territory ceded to the United States and herself.

Id. at 384.

Your Special Master believes that *Indiana v. Kentucky, supra*, answers Kentucky's arguments in this case in three sentences above quoted.

> She [Kentucky] succeeded to the ancient right and possession of Virginia, and they could not be affected by any subsequent change of the Ohio River, or by the fact that the channel in which that river once ran is now filled up from a variety of causes, natural and artificial, so that parties can pass on dry land from the tract in controversy to the State of Indiana. Its waters might so depart from its ancient channel as to leave on the opposite side of the river entire counties of Kentucky, and the principle upon which her jurisdiction would then be determined is precisely that which must control in this case. *Missouri v. Kentucky*, 11 Wall. 395, 401. Her dominion and jurisdiction continue as they existed at the time she was admitted into the Union, unaffected by the action of the forces of nature upon the course of the river.

Id. at 508.

Thus, this Court long ago invalidated Kentucky's present contentions. Your Special Master concludes that the decisions in *Indiana v. Kentucky, supra*, and *Handly's Lessee, supra*, control this case.

ACQUIESCENCE AND PRESCRIPTION

In light of the clear case law above discussed, it may be unnecessary to resort to the doctrine of prescription and acquiescence in deciding this case. As a matter of fact, Ohio's letter of October 11, 1974, to Special Master Forman, which serves as a reply brief, states that if the Special Master reaches the issue of acquiescence, the parties should be directed to submit evidence on the issue since it calls for a fact determination. Taking of evidence has not been requested of either party although both parties have made certain statements on the issue in their briefs. None of these statements outweigh the case law.

It does appear that Kentucky has recognized the 1792 low-water mark boundary in the recent past.

The Legislative Research Committee of the Kentucky General Assembly, which authored the Informational Bulletins marked Nos. 2 and 3, and above mentioned, stated in Bulletin 93 at page 3:

> Kentucky's North and West boundary, to-wit, the low river mark on the North shore of the Ohio River as of 1792, has been recognized as the boundary based upon the fact that Kentucky was created from what was then Virginia.

As mentioned in Ohio's brief, the office of the Kentucky Attorney General issued a 1963 opinion, OAG 63-847, stating in the syllabus:

> The boundary between Kentucky and Indiana is the low-water mark on the northern shore of the Ohio river as such mark was at the time Kentucky became a state in 1792. Kentucky sportsmen do not have a right under their licenses to fish right up to the bank on the Indiana side of the river, since under present water levels as affected by dams they may well be past the low-water mark and into Indiana territory.

Kentucky Attorney General Opinions 1960-64.

Kentucky has submitted copies of three bridge agreements with Ohio whereby it is stated that the location of the north (or east as the case may be) low-water mark of the Ohio River shall be as determined and designated by the Corps of Engineers, U.S. Army, and shall be considered as the boundary line between the State of Ohio and the Commonwealth of Kentucky. These contracts were executed in 1963, 1964 and 1968. Ohio alleges that there are other contracts which use the same line but which specifically provide that it shall not be considered as a determination of the location of the boundary. Your Special Master concludes that it would not be of benefit to take evidence involving the bridge contracts. Undoubtedly an agreement as to the boundary was made merely to expedite and facilitate the construction of the bridges. At approximately the same time as these contracts were being

executed, there were the Kentucky legal opinions above mentioned recognizing the 1792 boundary. Your Special Master prefers to rely on the previous cases in this Court rather than bridge agreements.

Prescription and acquiescence was mentioned by Mr. Justice Blackmun in portions of the prior opinion in this case when he discussed *Handly's Lessee*. *See Ohio v. Kentucky, supra*, at 650-52. The Court in its opinion, as above quoted, recognized the effect of "long acquiescence" which has been termed by another "the long settled and never doubted" rule. Again, *Indiana v. Kentucky, supra*, is in point. The Court there held that the doctrines of prescription and acquiescence were applicable, stating:

> It was over seventy years after Indiana became a State before this suit was commenced, and during all this period she never asserted any claim by legal proceedings to the tract in question. . . .
>
> This long acquiescence in the exercise by Kentucky of dominion and jurisdiction over the island is more potential than the recollections of all the witnesses produced on either side. Such acquiescence in the assertion of authority by the State of Kentucky, such omission to take any steps to assert her present claim by the State of Indiana, can only be regarded as a recognition of the right of Kentucky too plain to be overcome, except by the clearest and most unquestioned proof. It is a principle of public law universally recognized, that long acquiescence in the possession of territory and in the exercise of dominion and sovereignty over it, is conclusive of the nation's title and rightful authority. In the case of *Rhode Island v. Massachusetts*, 4 How. 591, 639, this court, speaking of the long possession of Massachusetts, and the delays in alleging any mistake in the action of the commissioners of the colonies, said: "Surely this, connected with the lapse of time, must remove all doubts as to the right of the respondent under the agreements of 1711 and 1718. No human transactions are unaffected by time. Its influence is seen on all things subject to change. And this is peculiarly the case in regard to matters which rest in memory, and which consequently fade with the lapse of time and fall with the lives of individuals. For the security of rights, whether of States or individuals, long possession under a claim of title is pro-

tected. And there is no controversy in which this great principle may be invoked with greater justice and propriety than in a case of disputed boundary."

Vattel, in his Law of Nations, speaking on the same subject, says: "The tranquillity of the people, the safety of States, the happiness of the human race do not allow that the possessions, empire and other rights of nations, should remain uncertain, subject to dispute and ever ready to occasion bloody wars.[1] Between nations, therefore, it becomes necessary to admit prescription founded on length of time as a valid and incontestable title." Book II, c. 11, § 149. And Wheaton, in his International Law, says: "The writers on natural law have questioned how far that peculiar species of presumption, arising from the lapse of time, which is called *prescription*, is justly applicable as between nation and nation; but the constant and approved practice of nations shows that by whatever name it be called, the uninterrupted possession of territory or other property for a certain length of time by one State excludes the claim of every other in the same manner as, by the law of nature and the municipal code of every civilized nation, a similar possession by an individual excludes the claim of every other person to the article of property in question." Part II, c. IV, § 164.

Indiana v. Kentucky, 136 U.S. 479, 509-11. This doctrine has been approved by this Court in other cases including *Michigan v. Wisconsin*, 270 U.S. 295, 308 (1926); *Louisiana v. Mississippi*, 202 U.S. 1, 53-54 (1906); *Virginia v. Tennessee*, 148 U.S. 503, 523 (1893).

Mr. Chief Justice Hughes, in *Arkansas v. Tennessee*, 310 U.S. 563, 570 (1940), concluded the principle of acquiescence and prescription is "essential to the 'stability of order' as between the States of the Union."

While this Court if it wishes can, as it did in *Texas v. Louisiana*, 426 U.S. 465 (1976), decide this case without resting its decision on the doctrine of prescription and acquiescence, the foregoing authorities are mentioned because they give support to the conclusions here reached, and the recommendations made.

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1. Footnote Omitted.

Your Special Master concludes that Ohio's claim is correct and that the boundary between the State of Ohio and the Commonwealth of Kentucky under the prior decisions of this Court is the low-water mark on the northerly side of the Ohio River as it existed in the year 1792 and not the low-water mark on the northerly side as it exists today.

RECOMMENDATIONS

Your Special Master therefore recommends:

1) That the Supreme Court of the United States determine that the boundary between the State of Ohio and the Commonwealth of Kentucky is the low-water mark on the northerly side of the Ohio River as it existed in the year 1792 and that said boundary is not the low-water mark on the northerly side of the Ohio River as it exists today.

2) That such boundary, as nearly as it can now be ascertained, be determined either a) by agreement of the parties, if reasonably possible, or b) by joint survey agreed upon by the parties. In the absence either of an agreement or survey, as provided above, within 60 days from the date of the Supreme Court's approval of this report, the Special Master, unless for good cause an extension of time is granted by the Special Master, with the approval of the Court, shall conduct hearings to determine the location of the boundary in 1792 as nearly as it can now be ascertained, and report to this Court his proposed findings and conclusions as to such boundary; that he be authorized to select and employ, prior to such hearings or during or after such hearings, a surveyor or surveyors to assist in determining such boundary line, if the Special Master deems such assistance advisable after consultation with counsel for the parties, the expense of such hearings and survey to be paid by the Special Master from funds deposited equally by the State of Ohio and the Commonwealth of Kentucky, reserving to the Supreme Court of the

United States the right, at the conclusion of this litigation, to tax all costs, including surveying costs, as it may hereafter determine to be just and reasonable.[e]

3) That the costs to date herein be taxed one-half to plaintiff and one-half to defendant and that no costs be taxed for the services either of Phillip Forman or of Robert Van Pelt, as Special Master herein.

4) That at the conclusion of this litigation the Special Master file a report, for approval by the Court, setting forth the amount of money advanced to him by the parties for the payment of costs and expenses and of the disbursement thereof, unless the parties prior thereto approve in writing the Special Master's report as to the receipt and disbursement of said moneys.

Respectfully submitted,

ROBERT VAN PELT,
Special Master

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e. Your Special Master recognizes that in an earlier case this Court appointed three Commissioners to survey and determine a similar state boundary. *See Indiana v. Kentucky*, 163 U.S. 520. Whether a Special Master or Commissioners serve is for the Court's determination.

APPENDIX A

In The

Supreme Court of the United States

October Term, 1973

NO. 27, ORIGINAL

THE STATE OF OHIO,
Plaintiff,

vs.

THE COMMONWEALTH OF KENTUCKY,
Defendant.

BEFORE THE HONORABLE
PHILLIP FORMAN, SPECIAL MASTER

STIPULATION

The parties, by and through their counsel, and subject to the approval of the Special Master, hereby enter into the following stipulation:

1. In its complaint the State of Ohio alleged that the boundary line between the two States is the low water mark on the northerly side of the Ohio River as it existed in the year 1792;

2. In its answer the Commonwealth of Kentucky alleged that the boundary line is the low water mark on the northerly side of the Ohio River as it exists today;

3. The parties, believing that a decision as to which of these two lines is the boundary can be reached as a matter of law, have agreed to submit that question to the Special Master on briefs;

4. The briefs shall be typewritten, and the original and three clearly legible copies shall be submitted to the Special Master;

5. The brief for the State of Ohio shall be submitted to the Special Master on or before July 15, 1974;

6. The brief for the Commonwealth of Kentucky shall be submitted to the Special Master on or before September 16, 1974;

7. The State of Ohio may, if it desires, submit a short letter to the Special Master in reply to the Commonwealth's brief within ten days after receipt of such brief;

8. If either party finds it impossible to comply with the schedule in the three preceding paragraphs, it may have such additional time as is necessary, provided the Special Master and the other party consent thereto;

9. After the briefs have been submitted, oral argument will be held only if the Special Master so directs;

10. Should it appear that certain factual issues must be resolved before a decision can be reached as a matter of law, the parties shall submit evidence in such form and manner as the Special Master shall direct;

11. Evidence by metes and bounds as to the exact location of either of the two alleged boundary lines is unnecessary at the present stage of the case.

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The Commonwealth of Kentucky

APPROVED:

Phillip Forman

PHILLIP FORMAN
Special Master

May 31, 1974